IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.450 OF 2003

Union of India and anr. ... Petitioners

v/s

M/s Jeevat Construction ... Respondents

Mr A.C. Singh with Mr Suresh Kumar for Petitioners.

Mr V.S. Samudrala for Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 30TH MARCH 2005

P.C.: -

1. By this petition, the petitioners challenge the award made by the learned Arbitrator awarding certain amounts on account of loss of profit and overheads. The facts that are necessary and relevant for deciding this petition are that the tenders were invited in December 1980 for construction of 11 buildings. The tenders were opened on 28th December 1980. The work order was issued on 18th January 1981. The period of completion of work was 19 months. The work was to commence on 2nd May 1981 and was to be completed on 2nd December 1982. Before the date of commencement of the work, the R.C.C. drawings were not made available to the respondent contractor. Therefore, on 2nd May 1981, the work could not be started. The architectural drawings were made available to the respondents on 15th June 1981 and R.C.C. drawings were made available on 14th July 1981. Even after the drawings were made available, the contractor did not start the work because according to the contractor, the monsoon had arrived and it was not possible for him to commence the work. The respondent contractor therefore applied for extension of time to complete the work and according to him, the extension should be granted without claiming any compensation and that the

petitioners should compensate the respondents for the expenditure which has been incurred by the respondents as also losses which they had to suffer because of overheads. The extension was not granted. Instead, the contract was terminated on 9th February 1982. There was an arbitration clause in the contract between the parties which was invoked. The matter was referred to the learned Arbitrator. The learned Arbitrator, after hearing both the sides, made the award, awarding an amount of Rs.8,30,260/- on account of loss of profit and an amount of Rs.8,66,676/- on account of overhead expenses. There are certain other amounts also awarded, but they are not challenged. So far as the amount of Rs.8,30,260/- on account of loss of profit is concerned, the learned counsel appearing for petitioners submits that the learned Arbitrator has held that the petitioners were not justified in terminating the contract while the application of the respondents seeking extension of time was still pending with the higher authority. The learned counsel submits that the learned Arbitrator committed an error in holding extension of time could not have been granted keeping the request for higher rates made by the respondents pending. The learned counsel submits that the learned Arbitrator has recorded that had the drawings been made available before 2nd May 1981, the work would have started in May 1981. It is submitted that even in that

situation considering that the foundation work was of 11 buildings, the contractor would be required to carry out the work during monsoon and therefore, only because of delay in supplying drawings, the contractor was not justified in seeking extension of time and higher rates. The learned counsel submits that the learned Arbitrator also has not considered the letters written by the contractor in which he has stated that unless extension is granted without any compensation and unless a provision is made for compensating the contractor for loss of profit and for overhead expenses, he will not accept the extension. The learned counsel therefore submits that the learned Arbitrator has excluded from his consideration relevant material and therefore, the award is in breach of the principles of natural justice.

2. On the other hand, the learned counsel appearing for respondents submits that the award is not required to be disturbed. The drawings were to be supplied in the month of April 1981, the contractor could have started the work on 2nd May 1981 and could have completed the work of foundation during three weeks of May 1981 before onset of monsoon, but because the drawings were given late, the work could not be started in May 1981. For starting the work immediately after drawings were received, higher rates were required because of the onset of monsoon. According to the

learned counsel, the learned Arbitrator has considered the entire material on record and has given reasoned award and therefore, unless some material is shown to have been excluded from consideration, this Court will not be justified in disturbing the award.

3. Now, in the light of these rival submissions if the record of the case is perused, it becomes clear that if the work was to be commenced from 2nd May 1981, obviously drawings ought to have been supplied before 2nd May 1981. As the drawings were supplied in the month of June / July 1981, the work had to be started during monsoon. In the letter dated 17th August 1981, in paragraph 1, the respondent contractor states that he has been given structural drawings for foundation on 20th June 1981 and he states that had those drawings been given to him in April 1981, he could have completed the foundation work before onset of monsoon. Paragraph 1 reads as under :-

> "1. The structural drawing for foundation namely drg. No.SSW/PT(b)/MUL-III/3 was received from the Assistant Executive Engineer only on 20th June 1981 with his letter dated 18th June 1981. Due to heavy monsoon which started, there was no possibility of doing the foundation work till the monsoon is over. If

> the foundation drawings were issued on 18/04/1981 immediately on award of the work, we could not complete the foundation work before start of monsoon, in which case we would have done some work in the monsoon also whenever clear days were there. There is no possibility of doing the foundation excavation and foundation work in the heavy monsoon."

. Two things are clear from the above quoted paragraph of the respondents' letter that the drawings for starting foundation work were made available to the contractor on 20th June 1981 and that it is the claim of the contractor that if he had commenced the work in April 1981, he could have completed the foundation work before onset of monsoon. Now it is to be seen that according to the contract, the date for commencement of the work was 2nd May 1981. Therefore, even if the drawings were given in April 1981 as per the contract, the work could have been commenced only from 2nd May 1981. Considering that the construction of the buildings was in Bombay and that the monsoon normally sets in in Bombay either in the last week of May or first week of June, it is difficult to believe that between 2nd May 1981 and the onset of monsoon either in the last week of May or first week of June, the respondents could have completed the foundation work of

all the 11 buildings. In my opinion, it will be reasonable to assume that even if the drawings were made available on time and even if the work had been started in first week of May 1981, the work of foundation would have to be carried out by the contractor during monsoon. It appears that taking advantage of the mistake on the part of the petitioners of not making made available the drawings before 2nd May 1981, the respondents were putting up unreasonable conditions. In this regard, in my opinion, contents of paragraph of the letter dated 17th August 1981 are relevant and important. They read as under :-

> "6. As we can start the work only in and of October 1981 or beginning of November 1981, you will have to grant us 6 months extension without levy of compensation and you should compensate us for the expenditure which we had to incur and losses which we had to suffer on account of overheads, establishment and other supervisory expenditure including the infructuous personal efforts of the partners, for which we should be compensated at the rate of Rs.17,000/- per month for the 6 months.

. The respondents were seeking extension of time of six months and they were imposing conditions. The

first condition was that the petitioners must agree to compensate them for the expenses which they had to incur and losses that they had to suffer because of delay in starting the work. The respondents were seeking compensation at the rate of Rs.17,000/- per month for six months. It is pertinent to note here that in paragraph 5 of that letter, it is stated that because of onset of monsoon they cannot work during monsoon and if they have to work during monsoon, the petitioners must agree for extra rates. As observed above, even if the work had started as per schedule, the contractor was obliged to work during monsoon and therefore, there was no justification for claiming any extra rates. In the letter dated 3rd October 1981, the contractor repeats what he had stated in the earlier letter and seeks extension of time. Perusal of the award shows that the learned Arbitrator has not considered these letters at all. In paragraph 13 of the award, the learned Arbitrator observes thus :-

> "13. It was possible for the respondents to inform the claimants that their request for higher rates and extension of time for completion of work can be considered in the course of the work under the contract and / or can be made the subject matter of an arbitration after the work is completed. Such

> reasonable course was not taken and obstinacy prevailed and contract terminated far far ahead of the completion period. And this presumably because the respondents were not at all keen and serious about the construction work at the present site, as seen from the undisputed fact that the site has till date remained as it is with the work totally abandoned."

. It is clear from the contents of paragraph 13 of the award that the letter dated 3rd October 1981 has not been considered. In view of the contents of the letter, there was no way for the petitioners to grant extension of time and keep the issue of compensation and higher rates open. The request of the respondents for higher rates and for compensation was plainly unreasonable. I find that the learned Arbitrator has excluded from his consideration relevant matters like the period during which normally there is onset monsoon in Bombay, extent of work and whether the claim of the contractor that he was required to work during monsoon only because of delay in supplying drawings was right. The award dated 30th June 2003 is clearly in breach of principles of natural justice as relevant material has been excluded from consideration. In this view of the matter therefore, the learned Arbitrator was not at all

justified in awarding any amount against claim No.1 viz. loss of profit and against claim No.2 viz. overheads. The award to that extent is liable to be set aside. Petition is therefore disposed off in following terms :-

4. The award made by the learned Arbitrator against claim No.1 and claim No.2 is set aside. The award be modified accordingly. Petition is disposed off. The respondents are directed to pay costs of this petition as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Personal Secretary as true copy.

. Certified copy expedited.